(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Paul J. Jenkins, Trustee of Green River Realty Trust
Petitioner

v.

Meetinghouse Cooperative Bank,
Respondent

Petition For A Writ Of Certiorari
To The Supreme Judicial Court
of Massachusetts

PETITION FOR A WRIT OF CETIORARI

Paul J. Jenkins, Trustee
Green River Realty Trust
PO Box 15
Holbrook, MA 02343
(508) 238-9632

Petitioner. Pro SE

35pp

QUESTIONS PRESENTED

1. Whether or not Petirioner's Due Process rights were violated by the Massachusetts' courts refusal to remove a default judgment obtained without either actual or constructive service of process?

2. Whether or not Petitioner's Due Process rights were violated by the Massachusetts Superior Court's denial of Petitioner's motion to remove a default judgment as a discovery sanction without giving Petitioner leave to argue the sanction issue either orally or in writing?

3. Whether or not Petitioner's Due Process rights were violated by the refusal of the Massachusetts courts refusal to recognize his standing as Successor Trustee of Green River Realty Trust?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Paul J. Jenkins, Trustee of Green River Realty Trust, prays that a Writ of Certiorari issue to review the orders issued by the Massachusetts Appeals Court on March 15, 1995. Said orders were affirmed by the Supreme Judicial Court of Massachusetts when it denied reconsideration of its denial of a "Petition for Further Appellate Review" on July 11, 1995.

OPINIONS BELOW

The Suffolk Superior Court, by Justice Hiller B. Zobel, denied Petitioner's Motion for Relief from judgment as a sanction on December 7, 1993, without allowing Petitioner to be heard (Appendix A).

The Massachusetts Appeals Court affirmed the ruling of the Superior Court on March 15, 1995 (Appendix B).

The Massachusetts Appeals Court, without offering an opinion, denied a Petition for Reconsideration on April 3, 1995 (Appendix C).

The Supreme Judicial Court of Massachusetts, without an opinion, denied an Application for further Appellate Review on June 5, 1995 (Appendix D).

On July 11, 1995 the Supreme Judicial Court of Massachusetts, again without any explanation, denied a Petition for Reconsideration of Denial of Further Appellate Review (Appendix E).

JURISDICTION

The Supreme Judicial Court of Massachusetts denied a Petition for Reconsideration of Denial of Further Appellate Review on July 11, 1995. The Petitioner invokes this certiorari jurisdiction under **28 U.S.C. Section 1257(3).** Petitioner argued below that the trial court's ruling would violate his rights under both the United States Constitution and the well established law of the Commonwealth of Massachusetts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

U.S. CONSTITUTION, ADENDMENT V.

STATEMENT OF CASE

This is a petition for review of an order of the Massachusetts Appeals Court (Appendix B).

On September 23, 1993 Petitioner filed a motion for relief from judgment entered against Green River Realty Trust and Petitioner's predecessor in interest (original trustee Martin J. Worobey). After the trial judge ordered Respondent to depose the Petitioner regarding issues of standing and knowledge, Respondent's counsel engaged in a series of bizarre and abusive tactics which caused the deposition not to occur. On December 7, 1993 the trial court, as a sanction against the Petitioner, denied his Motion for Relief from Judgment (Appendix A). Moreover, the Petitioner was given no opportunity to be heard on the issue before sanctions were imposed. The main issue of Petitioner's motion, i.e., that neither Petitioner nor his predecessor in the underlying action, never received attention by the trial court.

The Massachusetts Appeal Court also never touched the main issue of the case in its ruling (Appendix B).

The Supreme Judicial Court of Massachusetts, in affirming the ruling of the Massachusetts Appeals Court, offered no opinions (Appendices D and E). The final ruling of the Supreme Judicial Court of Massachusetts was July 11, 1995 (Appendix E).

GROUNDS FOR INVOKING THE JURISDICTION OF THIS COURT

(i) Date of Entry of the judgment or decree sought to be reviewed: July 11, 1995.

(ii) Date of any order granting an extension of time within which to file the petition for a Writ of Certiorari: none.

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari: **Title 28 United States Code. Section 1257.**

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment V.

REVIEW OF JUDGMENT OF A STATE COURT

Title 28 United States Code, Section 1257

REVIEW OF A JUDGMENT OF A UNITED STATES COURT OF APPEALS

Not applicable

REASONS FOR ISSUING THE WRIT

I. THE TRIAL AND APPELLATE COURTS OF THE COMMONWEALTH OF MASSACHUSETTS VIOLATED THE DUE PROCESS RIGHTS OF THE PETITIONER BY REFUSING TO REMOVE A DEFAULT JUDGMENT OBTAINED WITH NEITHER ACTUAL NOR CONSTRUCTIVE SERVICE OF PROCESS.

Since the Respondent in this case never achieved any manner of service on the Petitioner, Petitioner's predecessor in interest, or any other agent of the Green River Realty Trust, the judgment has to be vacated as "void." **Massachusetts Rule of Civil Procedure 60(b)(4); Luben v. Selective Service System Local Board No. 27, 453 F. 2d 645, 649 (1st Circuit 1972); Field v. Massachusetts General Hospital, 393 Mass. 117, 469 NE2d 117, 118 (1984).**

Not only did Respondent fail to achieve service by sheriff or by publication, they failed to produce a signed mail receipt or other proof of delivery from their random certified mailings to bogus addresses. **See Massachusetts Rule of Civil Procedure (4).**

Under a long line of United States Supreme Court cases notice must be "reasonably calculated, under all the circumstances," to notify interested parties of the pending action. **Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Greene v. Lindsey, 456 U.S. 444 (1982); Walker v. City of Hutchinson, 352 U.S. 112 (1956). See also Tribe, American Constitutional Law, Sections 10-15.**

Turning to the case at bar, it can hardly be argued that certified mail sent to an inverified address which turns out to be a condominium club house and which is ultimately refused by an unknown party constitues a reasonable effort to serve a defendant.

II. PETITIONER WAS DENIED DUE PROCESS ON DECEMBER 7, 1993 WHEN THE TRIAL COURT IMPOSED SANCTIONS WITHOUT ALLOWING THE PETITIONER TO BE HEARD.

The trial court record in this case will show that the petitioner was afforded no opportunity to be heard on December 7, 1993, although the trial court was about to impose the severest of sanctiond for alleged violations of discovery orders. The record will show the event of December 7, 1993 to have been a "star chamber" proceedings, where the arguments of only one side (the Respondent) were heard.

The right to a hearing is a fundamental due process right. **Morgan v. United States, 304 U.S. 1, 18 (1938); Green v. McElroy, 360 U.S. 474, 497 (1959); Califano v. Yamasaki, 442 U.S. 682, 697 (1979).**

Only extraordinary circumstances may limit or deny the right to a hearing. **Wolff v. McDonnell, 418 U.S. 539, 563-564 (1974); Goss v. Lopez, 419 U.S. 565, 579-580 (1975).** Petitioner can see no extraordinary circumstances in this case which justified severely punishing Petitioner without allowing his to argue in defense of himself.

III. PETITIONER WAS DENIED DUE PROCESS WHEN THE MASSACHUSETTS APPEALS COURT INDICATED THAT PETITIONER COULD NOT REPRESENT THE GREEN RIVER REALTY TRUST AS A TRUSTEE.

The Judicial Court of Massachusetts has specifically held that a corporation cannot be represented **pro se** by any one of its corporate officers. **Varney Enterprises, Inc, WMF, Inc., 402 Mass. 79, 82 (1988).** Aforesaid case has not been extended to other entities, such as trusts, by the Supreme Judicial Court, the highest court of the Commonwealth of Massachusetts. Thus, until the Supreme Judicial Court of Massachusetts speaks further on these issues, there is no case or statutory authorities prohibiting trustees of any variety from representing trusts of any variety on a **pro se** basis. Thus, the Massachusetts Appeals Court, which has no authority to expand the law beyond the precedents set by the Supreme Judicial Court, was being impertinent at best in its rambling, somewhat incoherent discussion of various trust and trustees in its March 15, 1995 rulings, which suggested that Petitioner has no right to appear **pro se** (Appendix B). The Massachusetts Appeals Court had a chance to clarify its ruling but failed to do so (Appendix C). The Supreme Judicial Court

also failed to clarify the situation (Appendices D and E). This situation is further aggravated by the fact that the Petitioner has appeared **pro se** as trustee of another trust before the Massachusetts Appeals Court no more than one occasion. Petitioner had every reasonable expectation of being allowed to appear **pro se** on behalf of any trust until such time, if ever, the settled law changes; such an **ex post facto** change in the rules was fundamentally unfair to the Petitioner.

CONCLUSION

In light of the foregoing, this case is appropriate for review by this Court. It involves significant issues that need to be addressed by this Court. Since the Massachusetts courts have made rulings in conflict with a long line of United States Supreme Court decisions, a decision by this Court is necessary to establish uniformity.

Respectfully submitted

_____

Paul J. Jenkins, Trustee
Green River Realty Trust
Petitioner, **pro se**

Dated: October 2, 1995

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APPENDIX A

Ruling, Suffolk Superior Court, Trial Court of Massachusetts, Dated December 7, 1993.

APPENDIX B

Rescript and Opinion Affirming the Judgment of the Trial Court, Massachusetts Appeals Court, Dated March 15, 1995.

APPENDIX C

Ruling, Denying Petion for Reconsideration, Massachusetts Appeals Court, Dated April 3, 1995.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT
CA - 91-0402

MEETINGHOUSE COOPERATIVE BANK,
Plaintiff

vs.

MARTIN J. WOROBEY, TRUSTEE OF
GREEN RIVER REALTY TRUST, ET ALS
Defendants

MOTION TO REMOVE DEFAULT JUDGMENT ENTERED JULY 1st, 1991 on THE GROUNDS OF BEING VOID (M.R.C.P. 60 (b)(4)

Now come the defendant, Green River Realty Trust, by its successor Trustee, Paul J. Jenkins, and moves this Honorable Court for an order relieving it from the default judgment entered July 1st, 1991, as said judgment is null and void, all in accordance with M.R.C.P. 60(b)(4).

In support thereof, the undersigned states the following:

1. Plaintiff never obtained personal jurisdiction over the former trustee, Martin J. Worobey, having never properly served him by mail, Martin J. Worobey has never lived or owned any of the Florida addresses listed in

A-1 Continued

Affidavit in Support of Default Judgment;

2. Plaintiff reiterates the allegations of paragraph 1, supra, and further states that plaintiff never obtained a signed certified or registered mail receipt received by Martin J. Worobey; and

3. Defendant, moreover, was not properly served by publication or other allowable means of service provided for by these rules.

WHEREFORE, said default judgment should be removed.

/s/ Paul J. Jenkins, Trustee
Green River Realty Trust
PO Box 15
Holbrook, MA 02343-0015
Tel. (508) 238-9632

Dated: December 3rd 1993

The motion is denied. The record amply supports the conclusion that Mr. Jenkins is in violation of at least two court orders. The matter is in my judgment, and as a matter of disretion unsuitable for report to the Appeals Court, and to the extent that Mr. Jenkins is requesting such a report, the request is denied.

/s/ Hiller B. Zobel 12/17/93

B-1

COMMONWEALTH OF MASSACHUSETTS.

Appeals Court For The Commonwealth,

At Boston, March 15, 1995

In The Case Of

MEETINGHOUSE COOPERATIVE BANK

vs.

MARTIN J. WOROBEY, TRUSTEE

pending in the Superior

Court of the County of Suffolk

Ordered, that the following entry be made in the docket; viz., -

Order denying motion to vacate default judgment affirmed.

By the court,

/s/ Nancy Turck Foley, Clerk

March 15, 1995

NOTE:
The original of the within rescript will issue in due course, pursuant to M.R.A.P.23.

APPEALS COURT

B-2

COMMONWEALTH OF MASSACHISETTS

APPEALS COURT

94-P-714

MEETINGHOUSE COOPERATIVE BANK

vs.

MARTIN J. WOROBEY, trustee.(1)

MEMORANDUM AND ORDER UNDER RULE 1:28

Paul J. Jenkins, alleged trustee of Green River Realty Trust (the "trust"), appeals from a Superior Court order denying his motion to vacate a default judgment order against his alleged predecessor as trustee, Martin J. Worobey (A. I:2; II:142). (2) We affirm.

On January 17, 1991, to recover for the deficiencies after foreclosure of mortgages securing payment of two promissory notes, the plaintiff bank commenced this action against Worobey, individually and as trustee of the trust (A. I:1, 3-14).(3) On March 19, 1991, after having made numerous attempts to serve process upon Worobey both at his last known address in Massachusetts

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(1) Of Green River Realty Trust

(2) So much if the default judgment as was entered against Worobey individually is not before us, and we do not address it.

(3) By separate count, the bank also sought trustee process attachment against six trustee defendants (A. I:11-12). A Superior Court judge allowed the bank's ex parte motion for such relief (A. I:1), thus affording all relief sought on the count against the trustee defendants. That count is not before us, and we perceive no problems with the finality of the default judgment.

and at two address in Florida (A. I: 41-43), the bank requested that Worobey be defaulted (A. I:1, 38-39). Worobey was defaulted on June 27, 1991, on which date the bank requested that a default judgment be entered (A. I:1, 77, 78). On July 1, 1991, a default judgment was entered against Worobey, individually and as trustee, in the amount of $341,542,20 under Mass.R.Civ.P. 55(b)(1), 365 Mass. 822 (1974) (A. I;1, 79).

On September 23, 1993, Jenkins, Worobey's alleged successor as trustee, filed a motion under Mass.R. Civ.P. 60(b)(4), 365 Mass. 828-829 (1074) to remove the default judgment on the ground that the judgment is void for lack of service of process on Worobey (A. I:80). On October 26, 1993, a Superior Court judge held an initial hearing on the motion, and ordered Jenkins to attend a deposition to be scheduled by the bank so that the bank could investigate certain issues raised by Jenkins's motion, including the threshold issue of his standing to seek relief. The matter was rescheduled for further hearing on November 23, 1993 (A. I:171-172).(4)

Jenkins failed to appear for a deposition which the bank had scheduled for November 10, 1993, suggesting

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(4) At the October 26 hearing, when asked by the judge, Jenkins stated that Woeobey's address was 4353 N.W. 57th, Coral Springs, Florida (A. I:124). By letter dated November 9, 1993, sent to the bank's counsel, Jenkins stated (A. I:104): "I note that you sent Mr. Worobey's notice to the wrong address, which is 67th Avenue, not 57th."

instead that he be deposed on either November 18 ot 19. The bank scheduled his deposition for November 19, but on November 17, Jenkins informed the bank that he would not appear (A. I:94-95, 99, 104, 106-107, 113, 171-172). The bank rescheduled the deposition for November 29 (A. I:95, 117-118). By order dated November 24, 1993, a second judge found that Jenkins's deposition should take place prior to the hearing on his motion to vacate the default allowed the bank's motion to compel Jenkins to appear for the November 29 deposition, and reschedule the hearing on the motion to vacate until December 7, 1993 (A. I:171-172). Jenkins failed to appear for his deposition on November 29. After hearing on December, 1993, the first judge denied the motion to remove the default, noting that "the record amply supports the conclusion that Mr. Jenkins is in violation of at least two court orders" (A. II:142).

On the record before the judge, there is nothing to show the true nature of the trust at issue, (5) nor is there any evidence to show that Jenkins was purporting to

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(5) There is no indication whether the trust is a nominee trust, where the trustees have only perfunctory duties as compared to the duties of a conventional fiduciary trustee, Rent Control Bd. of Cambridge v. Praught, 35 Mass. App. Ct. 290, 294 (1993), and may act only at the direction of the trust beneficiaries. See Morrison v. Lennett, 415 Mass. 857, 860 (1993). "[F]or many purposes, nominee trusts are regarded as creating a principal-agent, rather than a true trustee-beneficiary, relationship." Moscatiello v. Assessors of Boston, 36 Mass. App. Ct. 622, 625-626 (1994). See most recently Roberts v. Roberts, 419 Mass. , & n.2 (1995).

represent himself as a beneficiary of the trust. A person appearing pro se does not represent another. Varney Enterprises, Inc. v. WMF, Inc., 402 Mass. 79, 82 (1988). As a threshold matter, therefore, the question of whether Jenkins, a pro se litigant, properly could pursue his motion on behalf of the trust or its beneficiaries was a proper subject of judicial inquiry. Comapre id. at 81-82. Jenkins does not contend otherwise, nor does he assert that the first judge erred by ordering him to appear for the deposition scheduled for November 29, 1993. In view of Jenkins's clear violation of court orders regarding discovery with no attempt to

comply or showing of an inability to coomply, (6) the judge's order denying the motion to remove the default judgment was proper. Mass.R.Civ.P. 37(b), as amended, 390 Mass. 1208-1209 (1984). See Roxse Homes Ltd. Partnership v. Roxse Homes, Inc., 399 Mass. 401, 404-406 (1987); Gos v. Brownstein, 403 Mass. 252, 257 (1988) Greenleaf v. Massachusetts Bay Transp Authy., 22 Mass. App. Ct. 426, 429-430 (1986); Maywood Builders

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(6) Pro se litigants are bound by the same rules and requirements as are aprties represented by counsel. Brossard v. West Roxbury Div. of the Dist. Ct. Dept., 417 Mass. 183, 184 (1994).

Supply Co. v. Kaplan, 22 Mass. App. Ct. 944-945 (1986).(7)

In view of the foregoing, we need not address Jenkins's remaining contentions.

Order denying motion to vacate default judgment affirmed.

By the Court (Armstong, Ferretta & Smith, JJ.).

/s/ Nancy Turck Foley
Clerk

Entered: March 15, 1995.

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(7) In not reaching the merits of the motion, the judge also did not consider the affidavit filed in support of it. The affidavit is thus not before us, and Farley v. Sprague, 374 Mass. 419, 423-424 (1978), is inapposite.

C-1

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

94-P-714

MEETINGHOUSE COOPERATIVE BANK

vs.

MARTIN J. WOROBEY, trustee.

The petition for rehearing filed by the appellant havingbeen considered, it is ordered that the said petition be abd it hereby is denied.

By the court (Armstong, Ferretta & Smith, JJ.),

/s/ Lena M. Wong
Assistant Clerk

Entered: April 3, 1995.

D-1

Supreme Court for the Commonwealth of
Massachusetts
1412 Courthouse, Boston,
Massachusetts 02108
(617) 557-1020

Paul J. Jenkins
P. O. Box 15
Holbrook
Holbrook, MA 023453

RE: Docket No. FAR-07835

MEETINGHOUSE COOPERATIVE BANK
vs.
PAUL J. JENKINS & another

NOTICE OF DENIAL OF F.A.R.
APPLICATION

Please take note that on June 5, 1995, the above-captioned Application for Further Appellate Review was denied.

/s/ Jean M. Kennett, Clerk

Dated: June 5, 1995

To: Keith C. Long, Esquire
Paul Jenkins

E-1

Supreme Judicial Court for the
Commonwealth of
Massachusetts
1412 Courthouse, Boston,
Massachusetts, 02108
(617) 557-1020

Paul Jenkins
P. O. Box 15
Holbrook
Holbrook, MA 023453

RE: No. FAR-07835

MEETINGHOUSE COOPERATIVE BANK
vs.
PAUL JENKINS & another

NOTICE OF DOCKET ENTRY

Please note that on July 11, 1995, the following entry was made on the docket of the above-referenced case:

DENIAL of petion for reconsideration of FAR application.

/s/ Jean M. Kennett, Clerk

Dated: July 11, 1995

To: Keith C. Long, Esquire
Paul Jenkins.

MASSACHUSETTS RULE OF CIVIL PROCEDURE 60(b)(4)

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therin arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affet the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rule or by an independent action.

UNITED STATES CONSTITUTUIN,
AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger: nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb: nor shall be compelled in any criminal case to be a witness against himself, nor be deorived of life, liberty, or proeprty, without due process of law; nor shall private property be taken for public use, without just compenstation.

No. 95-1046

Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

GREEN RIVER REALTY TRUST, PAUL J. JENKINS, ALLEGED TRUSTEE,

Petitioner,

vs.

MEETINGHOUSE COOPERATIVE BANK,

Respondent.

On Petition for Writ of Certiorari to the Massachusetts Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

KEITH C. LONG
Counsel of Record
CHRISTA A. ARCOS
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(617) 951-9000

8152
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

1. Whether, on the facts of this case, Massachusetts state law allowed the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court to affirm on appeal the decision of the trial court, pursuant to its long established civil rules and precedents, to deny a litigant's motion as a sanction for that litigant's willful disobedience of two court orders mandating him to appear for a deposition regarding the basis and validity of his motion.

STATEMENT OF INTERESTED PARTIES

Pursuant to Rule 29(6) of the Rules of the United States Supreme Court, Meetinghouse Cooperative Bank states that it has no parent companies and no subsidiaries that are not wholly owned.

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I. Petitioner Jenkins has misstated the question that was considered and ruled upon in this case by the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court. 8

II. The Decision of the Massachusetts Appeals Court considers only a state law issue, is proper, turns upon its own facts, does not affect individuals other than the litigants, and does not involve a "special" or "important" issue of law or fact 9

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Damiani v. Rhode Island Hospital, 704 F.2d 12 (1st Cir. 1983)9, 10

Friedman v. Globe Newspaper, Co., 38 Mass. App. Ct. 923 (1995) (rescript). 9

Link v. Wabash Railroad Co., 370 U.S. 626 (1962) 10

Pandey v. Roulston, 419 Mass. 1010 (1995) (rescript). 9

Statutes Cited:

M.G.L. c. 221, §§ 46 & 46A. 4

Rules Cited:

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NO. 95-1046

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Green River Realty Trust, Paul J. Jenkins, Alleged Trustee
Petitioner,

vs.

Meetinghouse Cooperative Bank,
Respondent.

On Petition for Writ of Certiorari to the Massachusetts Supreme Judicial Court

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner Paul J. Jenkins ("Jenkins"), the alleged trustee of the Green River Realty Trust, willfully disobeyed at

least two orders of the Massachusetts Superior Court, by refusing to appear for a deposition ordered by the Superior Court at which he would have been examined under oath, *inter alia*, regarding his purported status as alleged successor trustee.

The Massachusetts Superior Court denied Jenkins' Motion to Vacate the Default Judgment as a sanction for his willful disobedience of at least two Superior Court orders. Jenkins appealed from that denial.

On March 15, 1995, the Massachusetts Appeals Court issued a five (5) page opinion affirming the Superior Court's denial of Jenkins' motion as a sanction for his willful disobedience of court orders. Jenkins requested further review from the Massachusetts Supreme Judicial Court.

On June 5, 1995, the Massachusetts Supreme Judicial Court denied Jenkins' request for further appellate review. On July 11, 1995, the Massachusetts Supreme Court denied Jenkins' Petition for Reconsideration of that decision.

Respondent Meetinghouse Cooperative Bank ("Meetinghouse") submits that this court does not have jurisdiction to review the order in question by writ of certiorari because none of the possible questions presented by the petitioner concern conflicting decisions of courts of appeal or state courts, nor do they bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of its being repugnant to the constitution, treaty or laws of the United States. Likewise, the petitioner has not described any title, right, privilege or immunity as being especially set up or claimed under the constitution, treaty or statutes of the United States.

STATEMENT OF THE FACTS

Respondent Meetinghouse objects to petitioner Jenkins' characterization of the facts as misleading and incomplete. Respondent states that the true facts are as the Massachusetts Appeals Court has stated them in its decision and as reflected by the record. An accurate summary of the essential facts is as follows.

On or about April 27, 1989, defendant Martin J. Worobey ("Worobey") executed a Promissory Note ("Note"), pursuant to a real estate development project, for the principal sum of $225,000 in favor of respondent Meetinghouse. (R. AI 5). In 1989, Worobey defaulted on that Note. (R. AI 6). By January of 1991, Worobey's total indebtedness to Meetinghouse exceeded $341,542.20 and Meetinghouse filed the present action to recover on the Note. (R. AI 12).

On February 23, 1991, respondent Meetinghouse served the summons and complaint in this action on Worobey, both individually and as Trustee of the Green River Realty Trust, at his last and usual address, 11 Cheshire Road in Sharon, Massachusetts. (R. AII 65). Respondent Meetinghouse's process server was told that Worobey had sold that home and moved without leaving a forwarding address. (Id.). Worobey has never notified Meetinghouse of any change of address. Upon investigation, Meetinghouse discovered that Worobey owned at least two properties in Florida.

In February of 1991, Respondent Meetinghouse additionally served Worobey with the summons and complaint at those Florida addresses. (R. AII 69 and 71 [Return Receipt Mailings #P 729 140 358 and #P 729 140 360]) and (R. AII 73 and 74 [Return Receipt Mailings #P 729 140 359 and #P 729 140 357]). Service was deemed proper and complete by the

Massachusetts Superior Court. (R. AII 19). Worobey never responded to the Complaint.

On July 1, 1991, respondent Meetinghouse obtained a default judgment against Worobey both individually and as trustee of the Green River Realty Trust in the amount of $341,542.20 plus interest and costs. (R. AII 19). Respondent Meetinghouse was unable to locate any assets in Massachusetts with which to satisfy that judgment, and, therefore, looked to Worobey's Florida assets.

On January 23, 1992, Meetinghouse retained the services of Rosenfeld, Stein & Sugerman in Miami, Florida ("Florida counsel") to domesticate the Massachusetts judgment and proceed to locate and execute upon any assets owned by Worobey in Florida. On August 14, 1993, Florida counsel personally served Worobey, in Florida, with a deposition subpoena to appear for a "Deposition in Aid of Execution" on September 28, 1993. (R. AII 100). Worobey, however, never attended the deposition scheduled in Florida.

On September 3, 1993, prior to the Florida deposition, petitioner Jenkins filed, *pro se*, a Motion to Vacate the Default Judgment in Massachusetts purportedly on behalf of the Green River Realty Trust. (R. AI 80). At approximately the same time, Worobey hired counsel in Florida who successfully stayed the Florida proceeding, based upon the motion to vacate the default judgment which Jenkins filed in the present case. Worobey and his Florida counsel misrepresented to the Florida Court the effect of Jenkins' Motion to Vacate the Massachusetts Default Judgment, stating that if Jenkins were successful "everything filed [in Massachusetts] is void." (R. AII 103, para. 62). Jenkins, however, did not, and cannot, file a *pro se* motion in Massachusetts to vacate the judgment against Worobey personally, as Jenkins is not a licensed attorney. M.G.L. c. 21, §§ 46 & 46A. (Appendices F and G).

Similarly, it has never been established that Jenkins has *pro se* status as successor trustee to the Green River Realty Trust because he has willfully disobeyed two orders of the Massachusetts Superior Court directing that his deposition be taken for that and other purposes. (R AII 142).

In addition, Rule 60(b) of the Mass. R. Civ. Proc. states that the filing of a motion, such as Jenkins' motion, for relief from a judgment or order will not affect the finality of that order. Nevertheless, the Florida court refused to take judicial notice of Rule 60(b). Thus, in the Fall of 1993, the Florida action was continued pending the outcome of Jenkins' Massachusetts action to vacate the Default Judgment, and subsequently the Florida action was dismissed.

After Jenkins filed the Motion to Vacate the Default Judgment in Massachusetts in the Fall of 1993 (over two years after entry of the judgment) (R. AI 79, 80), Jenkins willfully disobeyed at least two Superior Court Orders by twice refusing to appear for a deposition ordered by the Superior Court. If this deposition had taken place, Jenkins would have been examined under oath, *inter alia,* regarding his purported status as alleged successor Trustee and the merits (or lack thereof) of his motion, and the collusion between he and Worobey to frustrate Meetinghouse's collection of its lawful debt.

On December 7, 1993, the Suffolk Superior Court denied Jenkins' Motion to Vacate the Default Judgment as a sanction because "Mr. Jenkins [wa]s in violation of at least two court orders." (R. AII 142). On December 9, 1993, petitioner Jenkins filed a notice of Appeal of the Superior Court's decision (R. AII 143) and requested two extensions of time in which to file an appellate brief and a copy of the transcript. (Appendices A and B). Following the issuance on March 15, 1995 of the Massachusetts Appeals Court's opinion affirming the Superior Court's denial of Jenkins' motion, he filed yet

another request for an extension of time. In that request, dated April 7, 1995, he asked for an order staying issuance of the Appeals Court's rescript opinion. (Appendix C). On April 12, 1995, respondent Meetinghouse requested that the Massachusetts Appeals Court deny petitioner Jenkins any further requests for extensions of time during the appellate process. (Appendix D). By order dated April 13, 1995, the Massachusetts Appeals Court stated that petitioner Jenkins should not expect any further enlargements of time. (Id.).

On Apri! 18, 1995, Jenkins filed an application for further appellate review to the Massachusetts Supreme Judicial Court. Meetinghouse opposed that request and, on, June 5, 1995, the Massachusetts Superior Court denied Jenkins' request. On July 11, 1995, the Massachusetts Supreme Court denied Jenkins' petition for reconsideration of that decision.

Petitioner Jenkins gave the Massachusetts Superior Court no reason for failing to contest the default judgment between 1991 and 1993. (R. AI 80-83). Nor did petitioner Jenkins ever explain to the Massachusetts Superior Court his refusal to appear for his court-ordered deposition at which he would have been questioned under oath concerning, *inter alia*, his alleged basis for standing to file the *pro se* motion to vacate, his interest in this case, and why he contends that the last and usual service on Worobey was not properly effected under the Massachusetts Rules of Civil Procedure. (R. AI 81-82). Similarly, Jenkins throughout the appellate process has failed to proffer an excuse for his willful violations of at least two Superior Court orders mandating that he attend such a deposition. Instead, Jenkins has delayed enforcement of the judgment by filing frivolous motions and petitions to exhaust every avenue of appeal asking for continuances each step of the way.

SUMMARY OF ARGUMENT

Respondent Meetinghouse Cooperative Bank respectfully requests that this Court deny the petition of *pro se* petitioner Paul J. Jenkins for Writ of Certiorari seeking to review the opinion of the Massachusetts Appeals Court in this case. That 5 (five) page opinion affirmed the Massachusetts Superior Court's denial of Mr. Jenkins' 1993 motion to vacate a 1991 Superior Court judgment as a sanction for Jenkins' willful disobedience of at least two Superior Court orders. In support of its request that the petition be denied, respondent Meetinghouse states that: (1) Mr. Jenkins has misstated the question considered and ruled upon by the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court in this case; and (2) this case involves only a state law issue, involves no "special" or "important" issue of law or fact, turns on its own facts, and does not affect individuals other than the litigants.

Although petitioner Jenkins has filed his motions *pro se*, he does not appear to have *pro se* standing in this case as Jenkins appears to be representing the interests of others, rather than his own interests. A *pro se* litigant representing the interests of others is, by definition, "practicing law" without a license. Further, Jenkins is apparently a former attorney who is illegally practicing law under the guise of a *pro se* title because his license to practice law in Massachusetts was suspended in 1986 for misusing client funds. (Appendix E). There is no merit to Jenkins' argument that the Massachusetts Courts lacked the power to deny his motion as a sanction for his inexcusable conduct. Mass. R. Civ. P. 37(b)(2)(C). (Appendix H). Jenkins' petition should be denied as it is meritless and was filed to further delay this litigation and the enforcement of the 1991 default judgment which the respondent obtained from the Massachusetts Superior Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner Jenkins has misstated the question that was considered and ruled upon in this case by the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court.

The issue which was considered and ruled upon by the Massachusetts Appeals Court in a 5 (five) page opinion was whether the Massachusetts Superior Court abused its discretion by denying Jenkins' motion to remove a default judgment. (P. Appendix B2-B6). The denial of Jenkins' motion was a sanction for his "clear violations of court orders regarding discovery with no attempt to comply or showing of an inability to comply." (P. Appendix B2-B6) and (Appendix H). The Massachusetts Appeals Court ruled that the dismissal of Jenkins' motion by the Massachusetts Superior Court was proper and that it was unnecessary to address the petitioner's "remaining contentions." (Id.). The Massachusetts Supreme Judicial Court denied Jenkins' request for further appellate review.

Here, petitioner Jenkins filed, allegedly *pro se*, a frivolous motion, ignored orders requiring him to appear for a deposition, and then appealed the denial of his motion which was a sanction for his own misconduct. Now, in addition to his willful violation of the Massachusetts Superior Court's orders and rules, Jenkins is requesting that the United States Supreme Court grant a Writ of Certiorari, in the complete absence of an "important" or "special" issue of law or fact. Even if petitioner Jenkins were not an attorney formerly licensed by the Commonwealth of Massachusetts and thus (presumably) fully familiar with court procedures and the consequences of willful disobedience of them (Appendix E), all *pro se* litigants must follow the rules of civil procedure. (P. Appendix B2-B6). In

fact, even if Jenkins were represented by licensed counsel and the misconduct was committed by that counsel, Jenkins could not avoid the consequences of that misconduct. *See Damiani v. Rhode Island Hospital*, 704 F.2d 12, 16 (1st Cir. 1983) (petitioner voluntarily chose his attorney to represent him and "cannot now avoid the consequences of the acts and omissions of this freely selected agent").

Jenkins' petition should be denied because the decision of the Massachusetts Appeals Court affirming the denial of Jenkins' motion as a sanction was proper. "The fact that [Jenkins] is *pro se* does not excuse him from compliance with relevant rules of substantive and procedural law." *Pandey v. Roulston*, 419 Mass. 1010, 1011 (1995) (rescript).

II. The Decision of the Massachusetts Appeals Court considers only a state law issue, is proper, turns upon its own facts, does not affect individuals other than the litigants, and does not involve a "special" or "important" issue of law or fact.

The Massachusetts Appeals Court properly ruled in its decision dated March 15, 1995, that the Superior Court's denial in the present case of petitioner Jenkins' *pro se* motion — as a sanction for petitioner's willful disregard of the Massachusetts Superior Court's orders — was well within the Superior Court's discretion. Mass. R. Civ. P. 37(b)(2)(C). (Appendix H). It is well established in Massachusetts that when "a [*pro se*] noncompliant litigant has manifested a disregard for orders of the court ... a trial judge need not first exhaust milder sanctions before resorting to dismissal." *Friedman v. Globe Newspaper, Co.*, 38 Mass. App. Ct. 923, 924 (1995) (rescript). Such a principle applies with even greater force to a *pro se* litigant like respondent Jenkins who is "well educated [] and able to understand the clear language of" the Superior Court's

orders and the Massachusetts Rules of Civil Procedure as he was once an attorney licensed to practice law in the Commonwealth. *Friedman v. Globe Newspaper Company*, 38 Mass. App. Ct. 923, 924 (1995) (rescript) and (Appendix E).

"There is certainly no merit to the contention that dismissal of [Jenkins'] claim because of his [] unexcused conduct imposes an unjust penalty on [him]." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962); Compare *Damiani v. Rhode Island Hospital*, 704 F.2d 12, 17 (1st Cir. 1983) (court turns a "deaf ear" on plaintiff's plea that he should not be penalized for his attorney's failures). Sympathy for Jenkins' argument "would be visiting the sins of [Jenkins] upon [Meetinghouse]." Damiani, 704 F.2d at 17.

The result of petitioner Jenkins' conduct is that he has now been successful in illegally practicing law in the Commonwealth of Massachusetts for more than two years. Petitioner Jenkins' involvement in the present case has been in representation of Martin J. Worobey's interests, not his own. Petitioner Jenkins' purpose in filing frivolous motions and using other dilatory tactics in the instant matter has been to prevent Meetinghouse from enforcing its 1991 judgment against Worobey in Florida, where Worobey and his assets resided in 1993. Petitioner Jenkins now has successfully obtained for Mr. Worobey more than two years in which to encumber, transfer, hide, or otherwise dispose of the Florida assets against which Meetinghouse had initiated suit, in 1993 in Florida, based upon the 1991 judgment. This Court should not permit any further delay.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

MEETINGHOUSE COOPERATIVE BANK,
By its attorneys,

Keith C. Long
Christa A. Arcos
WARNER & STACKPOLE
75 State Street
Boston, MA 02109
617-951-9000
Counsel for Respondent

DATED: January , 1996

APPENDIX A - DECISION OF THE MASSACHUSETTS APPEALS COURT ALLOWING JENKINS' MOTION FOR AN EXTENSION OF TIME IN WHICH TO FILE BRIEF

Commonwealth of Massachusetts

Suffolk, SS

Appeals Court
94-P-714

Meetinghouse Cooperative Bank,
Plaintiff-Appellee
v.

Green River Realty Trust, et al
Defendant-Appellant

MOTION OF THE APPELLANT FOR AN EXTENSION OF TIME IN WHICH TO FILE BRIEF

Now comes the undersigned appellant and moves this Honorable Court for an Order extending the time in which to file his brief up to and including July 20, 1994.

In support thereof, the appellant states that he is appearing pro se, and the additional time is needed to research and brief the issues raised by the considerable lower court file generated at the trial level.

Respectfully Submitted,

Paul J. Jenkins, Trustee

5/13/94

Green River Realty Trust
Paul J. Jenkins, Trustee
PO Box 15
Holbrook, MA 02343-0015
(617) 961-5601

Appendix A

Certificate of Service

I, Paul A. Jenkins, hereby make oath that I served notice of the within motion by mailing copies thereof by postage prepaid first class mail to Warner & Stackpole, 75 State Street, Boston, MA 02109 on 5/13/94.

Signed under the pains and penalties of perjury.

Paul J. Jenkins

insufficient cert. of service see MRCP 13(d)

May 16, 1994
APPEALS COURT
Allowed to 7/20/94 By
the Court, J.
Date: 5/16/94
ATTEST: Lena M. Wong
Assistant Clerk

May 16, 1994

APPENDIX B - DECISION OF THE MASSACHUSETTS APPEALS COURT ALLOWING JENKINS' SECOND MOTION REQUESTING AN EXTENSION OF TIME IN WHICH TO FILE BRIEF

Commonwealth of Massachusetts

Suffolk, SS. Appeals Court
94-P-714

Meetinghouse Cooperative Bank,
Plaintiff-Appellee

vs.
Green River Realty Trust, et als,
Defendant-Appellants

Motion of the Defendant-Appellants' For an Extension of Time In Which to File Brief and Appendix
(MRAP 14(b))

Now comes the appellants and move this Honorable Court for an order extending the time in which to file their brief and appendix (MRAP 14(b)) up to and including August 3rd, 1994. In support thereof, the Appellants refer the Court to the companion motion filed herewith with supporting affidavit.

Dated: July 15, 1994 By Appellants, pro se

Paul J. Jenkins, Trustee
Green River Realty Trust
Paul J. Jenkins, Trustee
PO Box 15
Holbrook, MA 02343-0015
(627) 961-5601

Appendix B

Commonwealth of Massachusetts
Appeals Court

July 7, 1994

Appeals Court
Allowed to 3 Aug 94

By the Court, J.
Date: 7 Jul 94
Attest: Gilbert P. Lima, Jr.
Assistant Clerk

APPENDIX C - DECISION OF THE MASSACHUSETTS APPEALS COURT ALLOWING JENKINS' MOTION FOR AN ORDER STAYING THE ISSUANCE OF A RESCRIPT

Commonwealth of Massachusetts

Suffolk, SS

Appeals Court
Docket No. 94-P-714

Meetinghouse Cooperative Bank,
Plaintiff-Appellee

vs.

Green River Realty Trust, et als
Defendant-Appellant

MOTION OF THE DEFENDANT-APPELLANT FOR AN ORDER STAYING ISSUANCE OF RESCRIPT

Now comes the appellant, under MRAP 23 and MRAP 14(b), and moves this Honorable Court for an order staying issuance of rescript up to and including April 19th, 1995.
Appellant states that this extension is necessary in order for the Appellant to file a timely application for further appellate review with the Supreme Judicial Court.

Dated: April 4, 1995

By the appellant, pro se,

Paul J. Jenkins, Trustee
Green River Realty Trust
Paul J. Jenkins, Trustee
PO Box 15
Holbrook, MA 02343-0015
(617) 961-5601

Commonwealth of Massachusetts
Appeals Court

April 7, 1995

Appeals Court

Allowed to 4/19/95

By the Court, J.
Dated 4/10/95

Attest: Ashley Ahearn
Assistant Clerk

APPENDIX D - DECISION OF THE MASSACHUSETTS APPEALS COURT ALLOWING MEETINGHOUSE'S MOTION TO PREVENT FURTHER STAY OF THE ISSUANCE OF RESCRIPT

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

MEETINGHOUSE COOPERATIVE BANK Plaintiff, v. MARTIN J. WOROBEY, TRUSTEE OF GREEN RIVER REALTY TRUST, et al., Defendants.	NO. 94-P-714

MOTION OF PLAINTIFF-APPELLEE MEETINGHOUSE COOPERATIVE BANK THAT PRO SE DEFENDANT PAUL J. JENKINS BE DENIED ANY FURTHER CONTINUANCES

Plaintiff Meetinghouse Cooperative Bank requests that pro se Paul J. Jenkins be denied any further extensions of time. In support of this motion, Meetinghouse states that Mr. Jenkins absolutely should not be allowed to obtain extensions of time in disregard of the rules of civil procedure. Mr. Jenkins did not

serve a copy of his April 7, 1995 request for an extension of time on Meetinghouse as provided by Rule 15 of the Massachusetts Rules of Appellate Procedure and Mr. Jenkins should not be allowed to further delay this litigation with dilatory tactics and frivolous motions filed in violation of those rules.

Although Mr. Jenkins has filed his motions pro se, he is apparently a former attorney illegally practicing law under the guise of a pro se title because his license to practice was suspended in 1986 for misusing client funds. (Exhibit A). Moreover, even if Mr. Jenkins were not an attorney formerly licensed by the Commonwealth, all pro se litigants must follow the rules of civil procedure. "The fact that [a] plaintiff is pro se does not excuse him from compliance with relevant rules of substantive and procedural law." Pandey v. Roulston, 419 Mass. 1010, 1011 (1995) (rescript).

In the present case, Mr. Jenkins filed a frivolous motion in the Superior Court to vacate a valid judgment that had been issued nearly two years prior. He then willfully disobeyed at least two Superior Court orders requiring him to appear for a deposition to ascertain his basis for standing to file such a motion. When the Superior Court sanctioned him by dismissing his frivolous motion, he filed a groundless appeal, and is now seeking to further delay the case by requesting extensions of time in which to request further appellate review. The result of this conduct is that Mr. Jenkins has now been successful in illegally practicing law in the Commonwealth for almost two years. Mr. Jenkins' involvement in the present case is in representation of Martin J. Worobey's interests, not his own. Mr. Jenkins' purpose in filing frivolous motions and using other dilatory tactics has been to prevent Meetinghouse

from enforcing its judgment against Worobey in Florida, where Worobey and his assets resided in 1993. Mr. Jenkins has now successfully obtained for Mr. Worobey almost two years in which to transfer, hide or otherwise dispose of the Florida assets against which Meetinghouse had initiated suit in 1993 in Florida.

As this Court held in its decision dated March 15, 1995, the dismissal, in the present case, of Mr. Jenkins' pro se motion, as a sanction for Mr. Jenkins' willful disregard of the Superior Court's orders, was well within the Superior Court's discretion. The Supreme Judicial Court has recently confirmed that when 'a [pro se] noncompliant litigation has manifested a disregard for orders of the court . . . a trial judge need not first exhaust milder sanctions before resorting to dismissal." Friedman v. Globe Newspaper, Co., 38 Mass. App. Ct. 923, 924 (1995) (rescript). Such a principle applies with even greater force to a pro se plaintiff like Jenkins who is "well educated [ ] and able to understand the clear language of" the Superior Court's orders as well as the Massachusetts Rules of Civil Procedure as he was once an attorney licensed to practice law in the Commonwealth. See Friedman v. Globe Newspaper Company, 38 Mass. App. Ct. 923, 924 (1995) (rescript).

WHEREFORE, Meetinghouse requests that pro se defendant Paul J. Jenkins be denied any further continuances and that he be required to comply with the Massachusetts Rule of Civil Procedure during the remainder of the case.

MEETINGHOUSE COOPERATIVE BANK,
By its attorneys,

_____

Keith C. Long (BBO #304220)
Christa A. Arcos (BBO #558851)
WARNER & STACKPOLE
75 State Street
Boston, MA 02109
(617) 951-9000

Dated:4/12/95

Appendix D

CERTIFICATE OF SERVICE

I hereby certify that a true copy of The above document was served upon the attorney of record for each other party by mail on April 12, 1995. Christa A. Arcos (BBO #558851)
Commonwealth of Massachusetts
Appeals Court April 12, 1995

Appeals Court

Mr. Jenkins should not anticipate an enlargement beyond 4/19/95 in which to file an application from further appellate review or to stay issuance of rescript.

4/13/95 By the Court,
Attest: Ashley Ahearn, Asst. Clerk

APPENDIX E - MEMORANDUM OF DECISION FROM THE MASSACHUSETTS SUPREME JUDICIAL COURT SUSPENDING PAUL J. JENKINS' LICENSE TO PRACTICE LAW IN THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 86-25 BD

IN RE: PAUL J. JENKINS

MEMORANDUM OF DECISION

This proceeding arises from a series of interrelated events triggered by a singular family situation. On March 8, 1985, Bar Counsel filed a Petition for Discipline with the Board of Bar Overseers (Board). Before a hearing committee of the Board, the attorney stipulated to a statement of agreed facts and joined in Bar Counsel's recommendation that the attorney be suspended from the practice of law for two years.

Following a hearing, the hearing committee made the following findings based on the stipulated facts. The attorney's mother died in 1979 after his brother Daniel, much to the attorney's distress, unilaterally authorized a doctor to terminate her life support system. In his capacity as administrator of his mother's estate, the attorney brought an action for wrongful death against the doctor and recovered a judgment of approximately $34,400 after payment of attorney's fees and costs. This sum he deposited in a personal checking account held jointly with his sister. Believing that Daniel was not entitled to any part of the estate, he refused to distribute a

share of the recovery to him. Within three months, the checking account was depleted.

With slightly less than $10,000 the attorney opened a "guardianship account" for his mentally retarded brother Charles. This account was eventually closed with no evidence of payments to or on behalf of Charles. Some time later a second account for Charles was opened with a $1,200 deposit. The attorney was also receiving Social Security payments on behalf of Charles, some of which he commingled with personal funds and used for business and personal expenses. Eventually he was ordered to render an accounting to the Probate Court of his handling of Charles's affairs. The account which he filed was by agreement perjurious. The attorney and his sister ultimately agreed to reimburse Charles's estate.

The attorney was admitted to the practice of law in the Commonwealth on December 19, 1980. The committee concluded that the attorney's youth and inexperience were factors which mitigated the gravity of his conduct, as was the emotional trauma which he was undergoing as these events transpired. He has acknowledged his dereliction, has cooperated fully with Bar Counsel, and is in the process of making full restitution.

In consideration of these facts and on recommendation of the Board of Bar Overseers that the attorney be suspended from the practice of law for two years, a judgment shall be entered accordingly.

July 31, 1986

Herbert P. Wilkins

_____

Herbert P. Wilkins
Associate Justice

APPENDIX F - M.G.L. C.221, §46A

§46. Practice of law by corporations; prohibition; exception.

No corporation or association shall practice or appear as an attorney for any person other than itself in any court in the commonwealth or before any judicial body or hold itself out to the public or advertise as being entitled to practice law, and no corporation or association shall draw agreements, or other legal documents not relating to its lawful business, or draw wills, or give legal advice in matters not relating to its lawful business, or practice law, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular; provided, that nothing herein shall prohibit a corporation or association from employing an attorney in regard to its own affairs or in any litigation to which it is or may be a party or the insurer of a party. Any corporation or association violating this section shall be punished by a fine of not more than one thousand dollars; and every officer, agent or employee of any such corporation or association who, on behalf of the same, directly or indirectly, engages in any of the acts herein prohibited, or assists such corporation association to do such prohibited acts, shall be punished by a fine of not more than five hundred dollars.

The provision of this section shall not apply to a professional corporation organized to practice law under chapter one hundred and fifty-six A. Amended by St.1935, c.346, § 1; St. 1963, c. 654, § 4.

APPENDIX G - M.G.L. C.221, §46

§46A. Practice of law; persons authorized

No individual, other than a member, in good standing, of the bar of this commonwealth shall practice law, or, by word, sign, letter, advertisement or otherwise, hold himself out as authorized, entitled, competent, qualified or able to practice law; provided, that a member of the bar, in good standing, of any other state may appear, by permission of the court, as attorney or counselor, in any case pending therein, if such other state grants like privileges to members of the bar, in good standing, of this Commonwealth.
Added by St. 1935, c. 346, § 2.

APPENDIX H - RULE OF THE MASSACHUSETTS RULES OF CIVIL PROCEDURE 37(b)(2)(C).

Rule 37. Failure to Make Discovery: Sanctions

(b) Failure to Comply With Order.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.